

Exhibit E

1 IN THE MATTER OF THE ARBITRATION)
2 BETWEEN)
3 ALFREDO SERRANO, BRIAN PATRICK)
4 THOMAS, DANIEL G. RAUP, DEAN HEIL,)
5 et al.,)
6 Claimants.)
7 vs.) No. 22-02150
8 MORGAN STANLEY,) c/w 22-02147
9 Respondent.)

10

11 TRANSCRIPT OF PROCEEDINGS had at the
12 arbitration of the above-entitled matter, held at
13 55 West Monroe, Suite 2600, Chicago, Illinois, on
14 the 29th day of February, 2024, commencing at
15 9:00 a.m.

16

17 BEFORE:

18 MARK W. SOLOCK, Umpire

19 ALLEN GREENBERG, Arbitrator

20 Caroline W. Harney, Arbitrator

21

22

23 Reported by: Cynthia J. Conforti, CSR, CRR

24 License No. 084-003064

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19
20 ALSO PRESENT:

21 Ms. Kimberly Grotenrath
Mr. Peter Hackshaw
22 Mr. Daniel Raup
Mr. Henry Enno
23 Mr. Gary Phelps
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1 issues before we start?

2 MR. GOLDSHAW: No.

3 ARBITRATOR SOLOCK: Then, Counsel, you can
4 proceed to your closing argument.

5 MR. GOLDSHAW: Thank you.

6 CLOSING ARGUMENT OF CLAIMANTS

7 MR. GOLDSHAW: The vesting periods were
8 too long. They were not permitted by ERISA.

9 In my opening statement, I was careful to
10 state our claim clearly because I didn't want the
11 question before this panel to be confused or lost
12 in the proceedings.

13 Did Morgan Stanley break the law when they
14 canceled deferred compensation awards to claimants
15 by relying on the long vesting periods in their
16 deferred compensation plan?

17 ERISA protects employees; that's the
18 purpose of the statute. One of the ways it
19 protects employees is by setting maximum limits to
20 vesting periods, and Morgan Stanley's plan
21 exceeded them.

22 So if ERISA applies to Morgan Stanley's
23 deferred compensation plan, it's illegal. If
24 ERISA applies, the vesting schedule in the plan is

1 too long. The law has been decided on that.

2 There is a federal court opinion directly
3 on point. It addresses the exact same deferred
4 compensation plan that we have discussed this
5 week, and in that plan, the vesting periods exceed
6 the maximum limits set forth in ERISA.

7 The opinion issued by Judge Gardephe this
8 last November is directly on point. It holds, and
9 I quote from the opinion: "Morgan Stanley's
10 deferred compensation programs are ERISA plans."
11 That's the law.

12 Throughout this entire hearing, Morgan
13 Stanley has been trying to distract from the law.
14 They have done that by mischaracterizing our
15 claims and by flooding the panel with repetitive
16 testimony and irrelevant documents that have
17 nothing to do with whether their plan is governed
18 by ERISA. So to state our argument again, as in
19 the Shafer case decided by Judge Gardephe, we are
20 arguing under subsection 2 of the ERISA statute.

21 Morgan Stanley's arguments that its plan
22 was not set up as a retirement plan under
23 subsection 1 are irrelevant. Their attempt to
24 distract and confuse, just ignore them. They're

1 not part of our claims.

2 Under subsection 2, which is the only
3 subsection at issue here, what matters is the plan
4 documents, how it works, and what payments result
5 from it.

6 A deferred compensation plan is covered by
7 ERISA pursuant to the statute itself if -- we have
8 highlighted the language of subsection 2 that we
9 are under, if it, quote:

10 Results in a deferral of income by
11 employees for periods extending to the termination
12 of covered employment or beyond, end quote.

13 We'll be happy to provide copies of what
14 you see on the screen afterwards, after the
15 closing statements.

16 So the standard that is the focus is
17 whether Morgan Stanley's deferred compensation
18 plan results in a deferral of income by employees
19 for periods extending to the termination of
20 covered employment or beyond.

21 There can be no doubt, as the Court found
22 in Shafer, that Morgan Stanley's deferred
23 compensation plan results in a deferral of income
24 to employees to the period of separation or

1 beyond.

2 As Judge Gardephe found in Shafer, looking
3 at the plan documents itself, there are several
4 paths the plan provides that result in payments to
5 employees at or after the time of separation. And
6 they include, as a reminder, if the employee
7 retires from the industry, separates employment
8 due to death or disability, takes certain kinds of
9 governmental preference or is terminated
10 involuntarily during a layoff.

11 All of those paths under the plan lead to
12 the payment of income to employees at the time of
13 the separation or beyond. And that's enough.
14 That's what the statute provides. That's what
15 subsection 2 provides, and that's what Judge
16 Gardephe found when reviewing the exact same plan
17 that the panel is here this week to analyze.

18 Under ERISA to determine if a plan is
19 governed by ERISA, the decider has to look to the
20 plan documents itself. It is the plan that is
21 governed by ERISA or not. It's not actions or
22 communication -- that doesn't determine whether
23 something is governed by ERISA. It's the plan.

24 And because we wanted to make this clear,

1 we have cases -- we'll provide it in the cite.
2 These cases provide that the decision is based on
3 the express terms of the plan. And if the express
4 terms of the plan provide pathways for payments to
5 occur at or after the termination of employment,
6 the plan documents are all that are needed to be
7 considered.

8 Courts decide these matters, as a matter
9 of law, without submitting them to triers of fact
10 when the plan documents themselves, as they are
11 here, provide for these pathways to payment for
12 separation of employment and beyond. That's what
13 Judge Gardephe found in his decision.

14 Now, Morgan Stanley has tried hard to
15 minimize this by suggesting in various ways that
16 the plan didn't result in all that many payments
17 to separated employees.

18 And first off, in so doing, they are
19 relying on evidence outside the plan documents,
20 and so this is already afoul. We don't need to
21 look beyond the plan to know if the plan is
22 governed by ERISA.

23 But even more so, they haven't been
24 exactly straight with you in how they have

1 presented that evidence, and so I want to show you
2 what I mean.

3 Let's take a look at their first exhibit,
4 Respondent's Exhibit 1. This is the document they
5 used to calculate percentages. And what I
6 encourage you to look at is the column highlighted
7 in yellow. And what you will see is this shows
8 that this plan, in fact, resulted in large
9 payments to separated employees.

10 Every year tens of millions of dollars
11 under this plan were paid out to employees at or
12 after the time of separation of employment. This
13 is a plan that clearly results in payment in the
14 millions, tens of millions of dollars, to
15 employees at or after the separation of
16 employment. It is governed by ERISA. End of
17 story.

18 Since 2015, where our claims are faced,
19 there has been \$243 million by their own documents
20 paid to employees at or after the separation of
21 employment. That's almost a quarter of a billion
22 dollars, with a B. Are they seriously contending
23 a quarter of a billion dollars is de minimis? You
24 should look past that?

1 And Morgan Stanley also had an expert
2 witness prepare a chart, and I'd like to show you
3 that chart.

4 This is Exhibit 4, Respondent's Exhibit 4.
5 And this is the chart where they show the red
6 column, and it states only 14.7 percent of
7 payments under the MSCIP, the MSCIP, were paid to
8 separated employees.

9 First off, I can't help but note that's a
10 lot of money and that's enough for coverage, but
11 let's see how they presented this evidence by
12 looking back at the underlying data and seeing
13 what they did. They watered down the numbers by
14 looking back to periods that our claims do not
15 relate to. They look beyond 2015.

16 Let's take a look. This is the same
17 Exhibit 1 I showed you. I put brackets around it
18 so you can see where I'm focused. That's the part
19 that deals with -- if you see all the way on the
20 left -- are you able to see the numbers or should
21 I read them?

22 ARBITRATOR SOLOCK: [Nonverbal response.]

23 MR. GOLDSHAW: Okay. 2015, '16, '17 '18,
24 '19. If you look at the bracketed numbers and you

1 do the math, it's not 14.7 percent. The number
2 jumps to almost 20 percent. It's 19.9 percent to
3 be exact.

4 That means, to be very clear, that
5 according to their own documents from the year
6 2015 onward, which is where our case is focused
7 on -- and we get to decide where we are focused on
8 our case. We are focused on 2015 forward.

9 And if you look at those numbers instead
10 of the numbers that Morgan Stanley tried to
11 present you going back way beyond the period,
12 their own numbers confirm approximately 20 percent
13 of all the money paid under the MSCIP went to
14 employees at or after the time of separation of
15 employment. That's significant, especially when
16 that 20 percent means nearly a quarter of a
17 billion, with a B, dollars.

18 Morgan Stanley also tried to show that
19 only a small percentage, single digits of -- or
20 something like this. I think it was that or not
21 much more -- of the total compensation package to
22 FAs went into the deferred compensation plan.

23 What does that have to do with anything?
24 ERISA has no relationship to what percentage of

1 the total amount of an employee's compensation
2 goes into a covered plan. In fact, it's quite
3 normal. There's nothing unusual about ERISA plans
4 to constitute a small percentage of employees'
5 income. That's what ERISA protects.

6 You can't violate ERISA just because it
7 only violates a small percentage, a relatively
8 small percentage of an employee's total income.
9 There's nothing in the law like that.

10 Now, I also want to say that Morgan
11 Stanley, forgive me for saying, hasn't been
12 exactly straight in its arguments that the post
13 2015 deferred compensation was a bonus.

14 Recall when Mr. Kemp was testifying, what
15 he said, and I quote, is: "You can think of it as
16 a bonus," end quote.

17 And his careful word choice gives him
18 away.

19 Now, he said these words: "You can think
20 of it as a bonus," after our claims were filed
21 challenging the legality of the deferred
22 compensation plans under ERISA.

23 And what's going on here is that Morgan
24 Stanley has made legal arguments to try to argue

1 that these deferred compensation of words are
2 somehow a bonus because under the law, there's a
3 higher legal standard that applies to bonus.

4 They want to take advantage of this higher
5 legal standard, and if you note, virtually all of
6 the cases on this issue that they have cited are
7 bonus cases dealing with analysis of bonus, which
8 is not this case.

9 Judge Gardephe reviewed and found as a
10 matter of law -- let me get this quote right.
11 Quote, not my words, his, quote:

12 The deferred compensation programs at
13 issue here are not bonus programs, end quote.

14 This is clear unequivocal language from a
15 federal court which is an authority -- which is
16 the authority on this issue. His decision is the
17 law.

18 Now, Morgan Stanley has tried to suggest
19 that this panel shouldn't follow the Shafer
20 decision that holds that ERISA governs its plan by
21 saying -- I think the words were something like,
22 oh, all you need to know about it is it's dicta.
23 It's not dicta.

24 Dicta is an extraneous comment that a

1 Court might make in an opinion or something that's
2 not central to its holding. That's what dicta is.

3 Let's take a look at the Shafer decision.

4 Now, what I've done because I'm aware
5 you're viewing from a distance, is in your exhibit
6 binders, it's in dual-column format. It's a
7 little hard to read. This is the actual opinion
8 signed by him. It's the same words, just a little
9 easier to read instead of dual column.

10 Yes, so let me first show you, because we
11 talked a lot about this. I am not going to review
12 this very long decision with you, I promise. Go
13 all the way up. It's a long decision. You can
14 see on the top right, we are talking 56 pages,
15 right?

16 So here it is. So you can see at the top,
17 this is that Matthew T. Shafer v. Morgan Stanley.
18 Top right, Memorandum Opinion Order. This is the
19 judge's order, okay?

20 Judge Paul Gardephe. If you allow me, I'm
21 going to try to make this a little faster. I want
22 to make sure you can see. If you skip to the
23 bottom, last page. Here's his conclusion. He
24 signed it November 21st.

1 There it is, Judge Gardephe. It's signed,
2 right? United States District Judge. This is the
3 Shafer decision.

4 Now, it's a long decision. I want to
5 start at the part where the analysis occurs that
6 we have been talking about this week.

7 So here's where -- I start on page 26.
8 Obviously, read whatever you want. If you want to
9 read the other parts of the opinion, I am not
10 hiding anything.

11 But here, on page 28, is where it gets
12 interesting for this case. They talk about how
13 plaintiff's contention is that this is an ERISA
14 plan, and Morgan Stanley's arguing in this case
15 that because of the arbitration agreements -- the
16 same one that brought us here, that this case
17 should be brought not as a class action, but it
18 has to be like arbitration. That's what the fight
19 is about, a motion about whether this should go to
20 arbitration or not.

21 So here we go. We are looking at the
22 opinion. There's a lot in here. It's
23 considering -- he's describing why he needs to
24 reach this. And here I'll highlight this:

1 That in considering the arguments
2 regarding whether this should go to arbitration --
3 can you see my cursor moving around? I wish I had
4 one of those laser pointers.

5 ARBITRATOR SOLOCK: [Nonverbal response.]

6 MR. GOLDSHAW: The Court must first
7 determine whether (1) the compensation incentive
8 plan and the equity incentive plan -- that's the
9 MSCIP and the EICP are ERISA plans.

10 The judge is saying it's important to his
11 decision to make this ruling.

12 He goes -- it would take me more than an
13 hour to go over all this. So this is not meant --
14 because I would love for you all to read this
15 opinion, believe me, but I'm going to try to
16 highlight to guide your way through a little bit.

17 He then talks about whether the deferred
18 compensation plans are ERISA plans, not dicta.

19 This is the point he's addressing. And
20 this, by the way, was after he specifically asked
21 the parties in this case, including
22 Morgan Stanley, to provide legal briefing on the
23 issue of whether the plans were ERISA plans. So
24 everyone had a full and fair opportunity to make

1 their arguments to this federal judge because he
2 said this is what I'm going to look at.

3 Whether the deferred compensation plans
4 are ERISA plans, he's citing the law. Here's the
5 applicable law. There's a long discussion on the
6 statute and all these cases, including lots of the
7 cases that respondent is relying on now. Here are
8 all these cases that he's reviewing. This is not
9 just a quickie decision, right?

10 He's talking about the CFR and the statute
11 and the cases, that he's doing a survey from all
12 these places around the country. See, I know
13 these cases. I want to talk about all of them,
14 but I'm going to keep this moving.

15 In the Tolbert opinion, he's talking about
16 that one, which we've talked. He's still going on
17 in the decision before he eventually gets to...

18 He talks about here in Subsection B,
19 whether plaintiffs' deferred compensation programs
20 are bonus plans.

21 I point this out because I want the panel
22 to understand, when I quote the Shafer decision,
23 that Judge Gardephe found these are not bonus
24 plans. It was not a throwaway line. It is a

1 separate section and analysis of his opinion.

2 He goes forward looking at the plans
3 themselves, which, as I've already explained, is
4 the area focused to decide if it's governed by
5 ERISA, you look at the plans. He's not looking at
6 extraneous information. He's looking at the plan
7 documents to see the results in the deferral
8 payment at or after the time of separation of
9 employment.

10 So this is where concludes the deferred
11 compensation programs at issue here are not bonus
12 plans. He discusses Morgan Stanley's arguments.
13 The same arguments we're making to you here, he
14 rejected those.

15 He's talking about the case law, how other
16 courts have decided. He's doing a thorough
17 analysis and finding these are not bonus plans.

18 And then he gets to the issue, which is
19 the ultimate issue of course, of whether the
20 deferred compensation plans result in a deferral
21 of income by employees for periods extending to
22 the termination of covered employment or beyond.

23 After a week with me, you'll probably be
24 able to cite that phrase in your sleep, but that's

1 because this is where the ball game is, right?

2 It's talking about the definition of
3 ERISA. He's explained that this is coming
4 from -- and this is in answer to one of the two
5 questions, I believe, that the panelists have
6 asked us to address.

7 He is specifically analyzing where does
8 this money come from? Is it a bonus?

9 He says: No, it comes from their
10 commissions.

11 The grid. The grid. Remember, Morgan
12 Stanley spent a lot of time, I contend, trying to
13 confuse the issue by saying: Oh, we're trying to
14 simplify. We have all these grids before 2015.
15 We're condensing. And they said: We had to make
16 a couple tweaks to make it fit like a jigsaw.

17 Maybe that's more complicated than I can
18 understand. I'm not focused on that.

19 When you look at 2015, that's the document
20 where these awards were granted. They come from
21 commissions, the witness testimony, the documents
22 are clear, and Judge Gardephe found that.

23 Because the grid calculates the money, and
24 it says what percentage gets paid out now. And

1 then there's a separate column which tells what
2 percentage would go to deferred comp coming from
3 the commissions in the incentive comp part of the
4 plan.

5 And notably, I think Judge Gardephe,
6 mentions, but you can see for yourselves, that
7 plan document has a separate section on bonuses,
8 and that's not where it's coming from. That's an
9 attempt to confuse, respectfully. This, oh, it
10 could be thought of as a bonus.

11 Judge Gardephe finds, as is here, and this
12 is where I've quoted before: Both at the deferred
13 compensation programs resulted in the deferral of
14 income -- I'm not going to say the same language
15 over and over -- and after the reasons stated
16 above, which remember, is like ten pages worth of
17 analysis, the reason stated above, he is talking
18 about that.

19 This Court concludes that Morgan Stanley's
20 deferred compensation programs are ERISA plans.
21 Period, full stop. Federal court has made the
22 ruling.

23 I mean, in short -- I can take this down
24 for now, and we can get back to some other slides.

1 In short, I mean, Shafer is a very
2 thorough, analytical detailed opinion by a
3 prestigious federal judge, Judge Gardephe. Not
4 that all judges aren't prestigious, but he's a
5 particularly prestigious one, that he delves into
6 the plan documents, he does the analysis, he gives
7 the parties a chance to argue, and Morgan Stanley
8 lost. Their plan is covered by ERISA. That is
9 the law. That's the law.

10 Now, Morgan Stanley has tried to suggest
11 in some subtle ways as well that this panel
12 disregard the law in this case. And I want to
13 review them, because, again, my big concern here
14 is to avoid confusion and keep the focus of what
15 is the issue actually before this panel as we, the
16 claimants, decide, because we bring the claims,
17 right? We get to decide what the issue is we are
18 presenting based on our claims.

19 I want to point out ways that -- was
20 there --

21 ARBITRATOR SOLOCK: No.

22 MR. GOLDSHAW: I thought there was a
23 question.

24 One, they put forth two prior FINRA

1 arbitrations that they contend involve similar
2 issues that they won. These are decisions that
3 occurred before Judge Gardephe issued Shafer.
4 Those panels did not have a binding legal ruling
5 that these plans are governed by ERISA.

6 And plus, because of the nature of FINRA
7 arbitration awards, I don't have a complaint with
8 it. I'm just pointing out, there's not a reasoned
9 decision, so there's no way to tell what led those
10 panels to the decision they did.

11 Even if -- regardless, though, they did
12 not have a federal law compelling their finding
13 that ERISA governs these plans.

14 Two, Morgan Stanley has put forth a lot of
15 evidence to try to show that the claimants earned
16 a lot of money and they grew their business at
17 Morgan Stanley.

18 Again, what does that have to do with
19 whether Morgan Stanley set up a deferred
20 compensation plan with vesting periods that didn't
21 comply with ERISA? It's nothing. It has nothing
22 to do with it. Morgan Stanley's plans stand or
23 fall on their own terms. They apply equally no
24 matter how much money the claimants did or did not

1 make, or whether they made money at Morgan Stanley
2 for which they were paid, and by the way, for
3 which they provided value. That's why Morgan
4 Stanley was paying them.

5 It's not like Morgan Stanley didn't get a
6 share in the deal too, right? They benefitted
7 from the arrangement. But none of that has
8 anything to do with whether the vesting periods
9 are too long under ERISA, under their plans. It
10 is a pure distraction.

11 They have similarly put forth lots of
12 testimony about how recruiting is done to suggest
13 they need to consider cancellation of deferred
14 compensation awards as part of negotiations. Very
15 general statements. Nobody has any knowledge of
16 what happened during the claimants' negotiations,
17 and I point out there's no evidence that any of
18 the claimants actually negotiated for an offset.

19 But the idea here, if I could try to state
20 it more clearly than I just did, is that they seem
21 to be arguing, oh, you shouldn't care if we
22 violated claimants' ERISA rights because they made
23 up for it by negotiating good packages with their
24 next employer.

1 That has absolutely nothing to do with the
2 law. Under the law, if an employer fails to make
3 a payment, they're required to make the payment.
4 If someone negotiates for a very high-paying job
5 afterwards, that doesn't excuse an employer from
6 making the payments it was required to make that
7 the employee earned. It is a non sequitur. There
8 is no law on that point, and it is essentially an
9 argument that the panel disregard the law which
10 does not provide for an offset in the way that
11 they seem to be arguing.

12 They have been very good with some of
13 their word choices. They talk about these
14 exceptions as humanitarian exceptions. I don't
15 want to go down into the ditch and argue if
16 they're humanitarian or if they serve a purpose
17 for Morgan Stanley as well, et cetera, because
18 ERISA doesn't care. I know I'm sounding like a
19 broken record -- I hope not -- but ERISA doesn't
20 care what you call the exceptions.

21 They call -- is there a pathway to payment
22 to employees at the time of separation or beyond?
23 And there's no doubt whether you label it a
24 humanitarian exception or not, 20 percent of the

1 payments, as we saw when you did the data that
2 they put up the correct way by focusing on the
3 years that they're supposed to, about 20 percent,
4 for whatever reason you call it, went to employees
5 at or after the term of the separation of
6 employment, and the title you give it or the
7 reasons you wanted to do it is of no relevance
8 under ERISA. ERISA focuses on the plan and the
9 results.

10 Now, Morgan Stanley has also seemed to try
11 to argue that they needed to have these long
12 vesting periods to make the regulators happy.
13 They all seem to be suggesting that they can get
14 to regulatory problems or not comply with federal
15 regulations if they abide by ERISA.

16 That is complete nonsense. No federal
17 regulator is requiring Morgan Stanley to break the
18 ERISA law. And if you noticed when Mr. Kemp was
19 asked about it on cross-examination, he confessed
20 that the topic of ERISA never came up. No
21 regulator ever asked them to violate ERISA.
22 There's been no explanation as to why -- and to be
23 clear, we are saying they could have a deferred
24 comp plan. It just has to have ERISA-compliant

1 vesting schedules. They did not do it.

2 So this argument of "woe is me, we are
3 just trying to make sure that our investors don't
4 commit fraud, and we want to make the regulators
5 happy is complete nonsense.

6 Let me point out employers have a wide
7 array of devices at their disposal to make sure
8 their employees abide by rules and abide by codes
9 of ethics. Their playing employers without long,
10 non-ERISA-compliant, vesting schedules where their
11 employees are good stewards of the company, don't
12 violate codes of ethics, abide by the law. And,
13 yes, you can fire employees for doing for doing
14 this conduct. So this argument is really quite a
15 distraction, and I wanted to point out, shine the
16 flashlight, on why it makes no sense at all.

17 Same with their argument about employee
18 retention. They're really arguing that they need
19 to create these long vesting periods to create
20 financial disincentives so they can retain their
21 employees. Well, how about retaining the
22 employees for legal reasons, by providing a good
23 work environment, paying them well, treating them
24 fairly, providing a brand name that helps them

1 grow their business.

2 The idea that to retain employees you need
3 to violate ERISA is again absurd. It is not part
4 of the law, and I will call it out. It is an
5 attempt to try to put pressure, psychological
6 pressure, on the panel to look the other way for
7 their violating ERISA because you feel bad, "oh,
8 woe is me. We need to keep our financial
9 advisers." That is a ridiculous argument, and it
10 is not warranted by law. It is a distraction from
11 the law.

12 They have also subtly, I believe, tried to
13 create the impression that oh, we are just doing
14 what everyone else is doing, and we need to stay
15 competitive and everyone else is doing it. Well,
16 there's so many ways to go after that argument
17 it's hard to know where to start, but let me start
18 by saying that this panel need not be concerned
19 that there's going to be some sea change in the
20 industry if it rules in claimant's favor.

21 If there's a sea change, Judge Gardephe
22 already did that. He put an opinion out there
23 that is the law. It's widely available. So as
24 much clout and respect as I have for the panel, I

1 don't think that this panel's decision is going to
2 put the industry over the edge in how it handles
3 its deferred compensation schedule vesting.

4 And I will point out that it didn't, you
5 know, even before Judge Gardephe, Wells Fargo had
6 to pay -- made headlines. It was all over the
7 news about making \$79 million in payments for
8 settling ERISA claims. If you're interested,
9 publicly available documents. The witness was
10 wrong. Wells Fargo did claim the argument that it
11 wasn't governed by ERISA. He was wrong about
12 that, and that's something that if anyone finds
13 important could easily take judicial notice of
14 that.

15 But in addition to trying to get the panel
16 to disregard the law, Morgan Stanley this week has
17 tried to distract you with lots and lots of
18 totally irrelevant evidence, none of which goes
19 to: Does the plan result in a payment of income
20 to employees at separation or beyond?

21 Were the plans' vesting schedules too long
22 under ERISA? And did Morgan Stanley cancel
23 claimant's deferred compensation awards by relying
24 on the illegally long vesting provisions?

1 How much of their evidence went to those
2 issues which are the questions that guide this
3 decision? Almost all of the evidence that Morgan
4 Stanley presented goes to the various irrelevant
5 arguments that I've already mentioned, plus a
6 couple of straw man arguments that they introduced
7 that we didn't.

8 In Morgan Stanley's opening statement on
9 Monday, I've been waiting three days to get a
10 chance to argue and address the panel to correct
11 this. They badly misrepresented our claims.

12 You will recall that I made a big point at
13 the very beginning of my opening statement of
14 saying I want to be very clear on what we are
15 claiming here. You recall that at the prehearing
16 conference ten days before the hearing, we said
17 what the claims are. We narrowed our claims.

18 It's not unusual, before a hearing, we you
19 start out, you make a claim, you cast it broad,
20 you get some discovery, decide what claims you
21 want to pursue, you narrow. That's what we did.
22 And in order to have a launching point for lots
23 and lots of evidence about things such as, oh, the
24 claimants understood the plan. We made

1 disclosures. We have never argued in this hearing
2 that the claimants should win because they didn't
3 understand the plan terms or it wasn't
4 communicated.

5 It wasn't part of my opening statement.
6 It wasn't part of our arguments. None of our
7 witnesses testified to it. They kept parading
8 witnesses and documents to show how clearly the
9 terms of the plan were communicated.

10 And let me be clear, because I have to
11 keep coming back to this: Our contention is not
12 that the claimants did not understand the plan or
13 contentions that the plan is illegal, as a matter
14 of law, because the vesting periods are too long.
15 The vesting periods are too long. That's it.
16 ERISA does not allow those long vesting periods.

17 It doesn't matter if they're communicated
18 to the employees. It doesn't matter if the
19 employees agree to them. The employees don't have
20 the right to overall rule ERISA any more than the
21 employer does. This is all a big distraction,
22 almost as if to say that, oh, the claimants
23 understood the deal. They made a lot of money.
24 You shouldn't worry about the law. That is not

1 the role of the panel of arbitrators. It is to
2 apply the law, and the law is settled.

3 Again, all of this had the launching
4 point, not on my statements, but on
5 Morgan Stanley's statements in opening as to what
6 we were arguing. We get to say what we are
7 arguing, not them. We did not say that that was
8 our case, and that should be completely
9 disregarded and recognized for the distraction
10 that it is.

11 The other severe mischaracterization of
12 our claims that was made in Morgan Stanley's
13 opening statement is they actually said that we
14 conceded that Morgan Stanley's deferral of
15 compensation plans were legal before 2015. That
16 is absurd. We have never said that. Why would
17 anybody say that anyway, even if they thought it
18 was true? What they're saying is they are trying
19 to hook on to the fact that we chose to assert our
20 claims by focusing on the period of 2015 forward.

21 That is not the same as saying, "and we
22 concede that prior to 2015, we agree that was all
23 lawful." And then they try to say, well, if prior
24 to 2015, if it was lawful, well, there's not much

1 difference between what happened before and after.
2 That is a complete huge snowball of a distraction.
3 Why are you looking at the plan before 2015 if
4 that's not what our claims are based on?

5 If they really can stand behind the
6 legality of their plans starting in 2015, there's
7 no need for them to make this roundabout argument,
8 oh, well, instead of looking at 2015, let's look
9 at before. We'll prove that's legal, and it's not
10 too different, so this is legal.

11 What is that? That is a very indirect
12 path to argument, and it is, again, based on a
13 severe mischaracterization of the claims that I
14 tried very hard to very clearly state what we were
15 claiming, and that it was mischaracterized, and it
16 is the launching pad for lots and lots of
17 irrelevant evidence about what changes to the plan
18 took place.

19 Now, I can tell you that -- forgive me. I
20 think I might have gone out of order in my slides.

21 One of the other reasons that they are
22 focused on the period prior to 2015 relates to
23 Morgan Stanley realizing or deciding that it's an
24 advantage for them to try to characterize these

1 deferred compensation awards that were taken out
2 of the commissions and try to cast them as like a
3 bonus, right?

4 So let's look at -- we had a lot of these
5 examples -- or a number, I should say, but let's
6 look at just one to remind the panel of what I'm
7 talking about of how Morgan Stanley characterized
8 these awards before they knew about our claims
9 that they were violating ERISA, and before they
10 decided to try to argue they were bonuses.

11 So let's take a look. These are the
12 descriptions of the canceled awards. This is back
13 to one of our claims. And if you notice, prior to
14 2015, we have highlighted where they are
15 describing these awards as bonuses. That's what
16 they did before 2015.

17 But come 2015, after what they claim were
18 inconsequential changes to the plan, they go
19 silent. These aren't bonuses. They come from
20 where? Incentive compensation. 2015, incentive
21 compensation, 2016.

22 This is for the ES, for the EICP, the ones
23 on shares. I don't want you to think we are
24 hiding the ball. Let's look at the ones for the

1 cash. This is the MSCIP. You can see that's on
2 the left.

3 Here we go again: 2009, '10, '11, '12.
4 They have bonus, bonus, bonus, bonus. I guess it
5 starts at '10: Bonus, bonus, bonus, bonus.

6 And then we come to 2015, where supposedly
7 nothing changed. Remember, same as it ever was,
8 right? Well, not in their own documents.

9 All of a sudden, those bonuses are
10 incentive compensation, which is what we have been
11 arguing all along.

12 And so, again, I want to remind, and I
13 hope I am making clear to the panel, the only
14 reason any of this is coming up is because Morgan
15 Stanley has mischaracterized our claims as stating
16 that the plans were legal before 2015, and we did
17 not.

18 I want to show you why they're doing it.
19 We did not and in truth, it should not matter
20 because as the claimants, we have the right to
21 assert the claims that we want.

22 I did want to talk about damages,
23 including the panel's question regarding
24 attorneys' fees on damages.

1 Yes, so let's first start with the
2 document that was presented this morning and
3 admitted into evidence, right? I wasn't there for
4 the proceeding, the affidavit from Mr. Rosca.

5 ARBITRATOR SOLOCK: I'm not sure of the
6 status of that.

7 MR. GOLDSHAW: It needs to be -- the
8 discussion yesterday is we would come in this
9 morning and present it to the panel so it could be
10 admitted in part of the record. That's why I
11 didn't want to close our case officially.

12 ARBITRATOR SOLOCK: Is there any objection
13 to that?

14 MS. VERGOW: No objection.

15 ARBITRATOR SOLOCK: Okay. Declaration of
16 Alan Rosca with the attachments will be admitted
17 into evidence and made part of the record.

18 Its date is February 28, 2024. It's
19 affirmed under penalty of perjury by Mr. Rosca,
20 and it contains two attachments: Exhibit A, which
21 goes to expenses, and Exhibit B, which goes to
22 damages. Okay. That's admitted into the record.

23 (Rosca Declaration with Exhibits A and B
24 offered and received in evidence.)

1 MR. GOLDSHAW: Okay. And if you have that
2 handy, that was submitted this morning.

3 Oh, it is up on the PowerPoint. Thank
4 you. I have a wonderful team. It's on the
5 PowerPoint. It's a little too hard to read, So
6 I'm just going to try to describe it, because I
7 don't think we need to go over in detail here, but
8 when you do your deliberations, I want to make
9 sure that you understand the purpose of the
10 document and how it functions and how to use it.

11 It's really presented so that the panel
12 can assess the damages in the case, and what it
13 does is it first starts out with the deferred
14 compensation awards. It goes claimant by
15 claimant, and it lists out the total deferred
16 compensation awards that was canceled from 2015
17 forward.

18 As a reminder, we had some discussion
19 earlier on in the hearing. We stipulated to what
20 is the damages, and we limited it to 2015 forward.
21 And that's what this is. I'm trying to make it
22 easier for the panel.

23 The next column is interest.

24 ARBITRATOR SOLOCK: Well, that column

1 would be prejudgment interest, correct?

2 MR. GOLDSHAW: Correct.

3 ARBITRATOR SOLOCK: The next column is
4 post-judgment interest, right? Or damages -- if
5 damages are assessed, then the interest with those
6 damages, correct?

7 MR. GOLDSHAW: Yes. And the way -- I
8 think we are saying the same thing, but just to be
9 clear, it's just so that you don't have to get out
10 our calculators and add the two numbers up. The
11 third column is just adding the first two columns.

12 ARBITRATOR SOLOCK: We understand this
13 document. Our question is what's the
14 justification. What is your --

15 MR. GOLDSHAW: There's two.

16 ARBITRATOR SOLOCK: Okay. So what are
17 they?

18 MR. GOLDSHAW: One is that the statute
19 under which we are proceeding, ERISA, specifically
20 allows for the award of attorneys' fees, which are
21 routinely awarded in ERISA cases.

22 And secondly, the arbitrators' guide for
23 FINRA arbitrations. It's guide page 71, the cite
24 to ERISA. So that was the guide for the

1 arbitrators, page 71.

2 For ERISA, the statute we are proceeding
3 under, it's 29 U.S.C. Section 1132, so G, as in
4 Goldshaw, sub 1. There's case law. I guess I
5 don't need to show evidence of case law, but
6 you'll see they're routinely awarded in ERISA
7 cases when claimants prevail. And it goes the one
8 way. So when claimants prevail, the attorneys'
9 fees will go to that.

10 Also, the cite showing that costs can be
11 recovered in ERISA actions is 28 U.S.C.
12 Section 1920. I think it's actually really
13 somewhat of a backup to costs. If you get to the
14 first question to ERISA, we don't get costs twice,
15 right? But the ERISA statute can cover that.

16 And, for example, there's the case for the
17 appellate court in the same region as Judge
18 Gardephe's decision, I'll just read this because I
19 have a note passed to me from one of my colleagues
20 who did some quickie research. In response to the
21 panel's question, quote:

22 "In light of the ERISA fee provision's
23 'statutory purpose of vindicating retirement
24 rights granting a prevailing plaintiff's request

1 for fees is appropriate absent 'some particular
2 justification for not doing so.'

3 That case is Donachie, D-O-N-A-C-H-I-E,
4 versus Liberty Life Insurance. The cite is
5 745 F.3rd, 41, at page 47, Second Circuit, 2014.

6 It's the kind of thing that you will see.
7 So the statute itself talks about as an option the
8 case law will provide that. Unless there's some
9 compelling reason not to in light of the statutory
10 provisions, attorneys' fees should be awarded.

11 And while I know I can't really ask
12 questions during my closing argument, I hope I've
13 addressed the questions I wrote down from the
14 arbitrators, both as to the basis for attorneys'
15 fees and costs, and explaining how the plan
16 functioned in 2015 forward coming from the
17 deferred compensation where it's coming from the
18 commissions that were earned by the financial
19 advisers.

20 ARBITRATOR SOLOCK: The one thing that
21 wasn't addressed was -- and I know that you don't
22 think it's relevant, but prior to 2015, did the
23 pool of -- was there a change in where the
24 deferred compensation came from, as far as if you

1 know?

2 MR. GOLDSHAW: So this is my answer.

3 ARBITRATOR SOLOCK: I know you're going to
4 say it's irrelevant.

5 MR. GOLDSHAW: No. You've heard me say
6 that enough this week. I'm done saying that in
7 response to your questions. I am not going to do
8 that. The answer is this:

9 In this case, we received the compensation
10 guide for 2014, but we did not focus discovery on
11 that period the way we did for 2015, so I'm a
12 little hesitant to go too deep.

13 But what I can tell you is that it was not
14 the case for 2014, as it wasn't the system of what
15 they called a unified grid with the documents that
16 we showed you. And you don't remember the board
17 minutes? I didn't talk about that in my closing.

18 They specifically talk about the total
19 payout and then there's the footnote that talks
20 about the earned commissions. I hope you remember
21 that. Can we get a --

22 ARBITRATOR SOLOCK: That's okay.

23 MR. GOLDSHAW: Okay. So, but before 2014,
24 what we can see is the documents -- perhaps we

1 could bring up the document again, where we show
2 that prior to 2015 we saw the word "bonus" all
3 over the place.

4 ARBITRATOR SOLOCK: Exactly.

5 MR. GOLDSHAW: So we are not going to
6 argue if it was a bonus or not. We don't really
7 have that information that we would want to make
8 that -- we are not trying to make that argument,
9 but we are trying to rebut an argument that Morgan
10 Stanley raised by what we contend is a
11 mischaracterization of our argument, and we are
12 doing our best to counter it, not because we think
13 it's relevant, but we don't want it to create
14 confusion as we believe that confusion and
15 distraction has been the strategy we are trying to
16 battle.

17 ARBITRATOR SOLOCK: Okay.

18 MR. GOLDSHAW: So, I will -- I'm sorry.
19 Have I finished addressing all the questions, just
20 a little wrap-up?

21 ARBITRATOR SOLOCK: Sure.

22 MR. GOLDSHAW: Okay. So as I've been
23 arguing, Morgan Stanley has been encouraging you
24 throughout this hearing to ignore the Shafer

1 decision, which is the law, or to second-guess it
2 or to decide for yourselves that it was somehow
3 wrong or mistaken, and I want to say respectfully
4 that that is not appropriate in arbitration.

5 And, respectfully, the panel's duty is to
6 apply the law, and Shafer is the law.

7 And make no mistake that when you cut to
8 the core, Morgan Stanley is asking you to
9 disregard the law and, respectfully, a federal
10 court decision, if it is to be challenged, the
11 proper place to do that is in the federal courts,
12 the federal appellate courts, and it is not within
13 the province of a panel in arbitration to overrule
14 a federal court decision.

15 Thanks very much.

16 ARBITRATOR SOLOCK: Thank you.

17 You may proceed.

18 MS. VERGOW: Thank you, Mr. Chair.

19 CLOSING ARGUMENT OF RESPONDENT

20 MS. VERGOW: Good morning, members of the
21 panel. I want to start by thanking you for
22 listening to the evidence and to the parties and
23 witnesses this week. We saw you paying close
24 attention, we saw you taking notes, and we really

1 make a rebuttal argument?

2 MR. GOLDSHAW: Yes, please.

3 ARBITRATOR SOLOCK: You may proceed.

4 MR. GOLDSHAW: Thank you.

5 PLAINTIFF REBUTTAL CLOSING ARGUMENT

6 MR. GOLDSHAW: Morgan Stanley just said
7 play by the rules of the game. ERISA sets the
8 rules of the game.

9 Relying on the law in a federal court
10 ruling is not a "gotcha" argument. The decision
11 was not a radical departure. It was grounded in
12 two appellate court opinions among lots of other
13 law. I don't want to pull up the opinion again.
14 It thoroughly reviewed the court case law in
15 reaching its decision.

16 And most importantly, it is the only
17 decision to rule on the specific -- it is the only
18 decision to rule on the specific plan at issue
19 here.

20 One thing that every case has in common,
21 that both parties have cited except for Shafer, is
22 they deal with different plans. Plans have
23 differences and variations. I mean, they get
24 amended every year. We have heard that, right?

1 The exact plan that was considered in this
2 case was considered in Shafer, and that is the law
3 on that plan. We've heard, again, "a deal is a
4 deal," and I'd like to complete the expression, "a
5 deal is a deal unless it's illegal."

6 There's nothing in ERISA that provides
7 that if an employer gets employees to agree to an
8 unlawful vesting period that "a deal is a deal"
9 supplants federal law, which dictates maximum
10 vesting periods.

11 Employers can't get around the law by
12 getting their employees to agree to it. They
13 can't get around the law by having a disclaimer in
14 their plans.

15 This plan is not subject to ERISA. If
16 that were the case, I'm not sure every client
17 would not be subject to ERISA. It would include
18 the tag line. It's meaningless.

19 As tempting as it is to rebut the
20 individual arguments that we just heard, I would
21 like to just point out that all of the arguments
22 you just heard were presented to and considered
23 and analyzed and rejected by Judge Gardephe in
24 Shafer. There's nothing new.

1 Do we know why we have been cut off of the
2 meeting?

3 MS. CASALE: My Wi-Fi went out.

4 UMPIRE SOLOCK: I didn't do it.

5 MS. CASALE: My Wi-Fi cut out.

6 MR. GOLDSHAW: Ms. VerGow basically just
7 made an appellate court argument to this panel and
8 presented reasons why this panel should substitute
9 its judgment on Morgan Stanley's plan for that of
10 Judge Gardephe.

11 And while we are all capable of forming
12 our own opinions, respectfully the role of the
13 arbitration panel is to apply the law as it exists
14 now, not to decide issues like an appellate court
15 or to rule on the law as if you were the judge who
16 had set the law.

17 Important people. I'm not trying to
18 denigrate that, but there is the law out there,
19 and the law is made by the courts, and it is clear
20 on the plans at issue in this case.

21 Now, there was a lot of talk about
22 bonuses, and, again, the reason why is, as was
23 flashed on the board, there's a different standard
24 for bonuses. And that's some of the confusion

1 that's created.

2 Let's start from the beginning. This is
3 not a bonus plan. Judge Gardephe considered that
4 issue. He spent pages of analysis on that issue.
5 He reviewed the plans and the case law, and he
6 ruled in a way that I can't put up on the screen
7 right now: Point blank: This is not a bonus plan.
8 End of story, clear as day. No strings attached.
9 This is not a bonus plan. That is what is in the
10 federal court decision.

11 So the statutes relating to bonuses and
12 the cases are all a distraction because they're
13 dealing with something else. I also have to call
14 out that there was just a representation made to
15 this panel about what a prior arbitration position
16 decided and rejected arguments under ERISA.

17 Now, I continue to believe that the fact
18 that there was no federal court ruling at that
19 time is what matters most, but I also have to call
20 out that FINRA decisions do not contain reasoned
21 decisions, and the representation of what they
22 decided or not under ERISA or the reasons for
23 their decision is not supported in any way.

24 There is no way -- we can all take our

1 guesses, but that's not -- it certainly is not a
2 basis to disregard well-reasoned, firm opinions by
3 federal court judges.

4 You heard again arguments about how
5 important the deferred compensation plans are to
6 Morgan Stanley, and, without regurgitating, wish
7 to remind the panel that regardless of how
8 important they consider them or not, there is no
9 exception to the law to require compliance with
10 the law based on how important it is.

11 It's as if to say, well, the law doesn't
12 allow it, but I really, really, really want to do
13 it, so, okay, then the law will bend. No, it
14 doesn't work that way.

15 We heard, yet again, how the plan was
16 communicated and the claimants understood the
17 words. You saw that posted on the screen -- do we
18 have access to the screen yet -- listed on the
19 screen about how the complainants admitted that
20 they understood the award.

21 Yes, without saying that, this is all just
22 an excuse to point to evidence of things that are
23 not at issue in the case. That has nothing to do
24 with whether the vesting provisions comply with

1 ERISA or not.

2 And I will tell you that respondent's
3 counsel has accused us of putting form over
4 substance, you'll recall. And I can't help but
5 bring up and show you, if we have access to it,
6 what Judge Gardephe said about the same arguments
7 that Morgan Stanley just made to this panel.

8 MR. GOLDSHAW: Can we highlight that or is
9 that...

10 Let's get the whole paragraph. I want to
11 make sure the context is there. Thank you. It's
12 blue, but you can read it?

13 UMPIRE SOLOCK: Yes, I can.

14 Can you read it?

15 ARBITRATOR GREENBERG: [Nonverbal
16 response.]

17 MR. GOLDSHAW: We can enlarge it.

18 Defendants are Morgan Stanley, right?

19 Defendants argue, however, that plaintiffs
20 did not earn payments under the compensation
21 incentive plan and equity incentive plan in
22 advance of receiving such payments.

23 By the way, exactly what you just heard
24 argued now, right?

1 Continuing: Because financial advisers,
2 quote, have no right to payment until and unless
3 they remain employed at vesting - a condition
4 plaintiffs did not meet, end quote.

5 Okay. Pause. Same argument you just
6 heard right now from Morgan Stanley's counsel.
7 There's the citation.

8 Defendants thus argue, that, quote, Morgan
9 Stanley's program does not entail any, single
10 quote, deferral of income by employees, single
11 quote, end quote.

12 Again, same arguments you heard just now.

13 Judge Gardephe continues: This argument
14 is not persuasive because it exalts form over
15 substance.

16 Morgan Stanley is asking you to play the
17 role of an appellate court. They are telling you
18 point blank Shafer got it wrong I think were the
19 exact words. You made a mistake.

20 That is asking you, as a FINRA arbitration
21 panel, to disregard the law as it stands now,
22 which is not appropriate to ask of a panel.

23 The law for these exact plans has been
24 decided. They are not bonus plans. They are

1 ERISA plans. It's been decided. And their
2 vesting periods are too long to comply with ERISA.

3 Counsel made a comment about they would be
4 required to not pay out under ERISA. It's not
5 true. It's not the law. I haven't heard that
6 before, but I will tell you, they can put their
7 money into a self-directed account, they can take
8 money out, there's different tax consequences, but
9 it's wrong to say that they couldn't access the
10 money.

11 Again, it's a distraction. I almost wish
12 I hadn't mentioned it just now because it's so far
13 off the path of whether the plan at issue is
14 governed by ERISA, which it is. We know that from
15 the law.

16 Whether Morgan Stanley's plan complied
17 with the vesting requirements, they were too long,
18 we know that. And whether they cancelled the
19 awards previously awarded to the claimants by
20 relying on those illegal vesting provisions, and
21 we know that they did, that's why we presented
22 such a simple case of getting the plan documents
23 before you, so you could see the terms of the
24 plan, which is what you need to determine that, as

1 Judge Gardephe did, that it's governed by ERISA.

2 And we have simple, short testimony
3 showing that these awards were granted and then
4 canceled, due to the reliance on the illegal
5 vesting provisions. That's it.

6 And so at the end of my comments I want to
7 thank you for your time in this hearing, and my
8 lasting comments, which I hope you will recall, is
9 to pay careful attention, of course, to what is
10 the law you're being asked to decide this case
11 under, and what evidence and testimony have you
12 seen relates to that decision, that simple
13 three-part decision that, one, Judge Gardephe
14 found is governed by ERISA; two, that the vesting
15 provisions are too long, and, three, 1.5 million
16 in deferred compensation awards were canceled by
17 relying on those unlawful provisions.

18 Thank you.

19 UMPIRE SOLOCK: Thank you, both. The
20 panel would, first of all, like to thank the
21 attorneys in this case for their preparation and
22 professionalism.

23 If we could be provided the documents that
24 were promised us, because we are not going to be